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DEC 03 2004

OFFICE OF PETITIONS

In re Application of	:	
Justin Page	:	
Application No. 09/557,252	:	DECISION DISMISSING
Filed: April 24, 2000	:	PETITION
Title: SYSTEM AND METHODS AND	:	
COMPUTER PROGRAM FOR PREVENTION,	:	
DETECTION, AND REVERSAL OF IDENTITY	:	
THEFT	:	

This is a decision on the renewed petition under 37 CFR 1.137(a), filed November 2, 2004, to revive the above-identified application.

The above-identified application became abandoned on March 20, 2003 for failure to timely file a proper response to the final Office action, mailed December 19, 2002. A Notice of Appeal was timely filed on February 24, 2003; however, this filing did not prevent abandonment because the accompanying check for the required appeal fee was returned by petitioner's bank. Thus, the reply was insufficient.

By decision mailed October 12, 2004, the initial petition under § 1.137(a) was dismissed for failure to submit the required reply to the Office action and for failure to show to the satisfaction of the Director that the entire delay in filing the required reply to the Office action was unavoidable.

On instant renewed petition, applicant submitted an amendment in reply to the Office action, as well as, further evidence in support of a conclusion that the delay was unavoidable within the meaning of § 1.137(a).

DISCUSSION

A grantable petition under 37 CFR 1.137(a) must be accompanied by: (1) the required reply, unless previously filed; (2) the petition fee as set forth in 37 CFR 1.17(1); (3) a showing to the satisfaction of the Director that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(a) was unavoidable; and (4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(c). The instant petition still lacks satisfaction of requirements (1) and (3).

As to requirement (1), applicant has now submitted the required reply in the form of an amendment. However, the amendment has been determined by the examiner not to place the application in condition for allowance. (See enclosed Advisory Action). A proper reply to a final Office action required for consideration of a petition to revive must be either (1) a Notice of Appeal (and fee required by law), (2) an amendment that prima facie places the application in condition for allowance, (3) the filing of a continuing application, (4) a request for continuing examination under § 1.114, or (5) if applicable, a § 1.129(a) submission.

Accordingly, it is concluded that a proper reply is still required to satisfy § 1.137(a).

As to requirement (3), the showing of record before the Office is inadequate to establish unavoidable delay within the meaning of 37 CFR 1.137(a)(3).

35 U.S.C. § 133 provides that the Director may revive an application if the delay in replying to the outstanding Office action is shown to the satisfaction of the Director to have been unavoidable. The burden of showing the cause of the delay is on the person seeking to revive the application. Smith v. Mossinghoff, 671 F.2d 533, 538, 213 U.S.P.Q. 977, 982 (D.C. Cir. 1982). This burden includes establishing that the entire delay from the due date for the reply until the filing of a grantable petition was unavoidable. Haines v. Quigg, 673 F.Supp. 314, 316-17, 5 U.S.P. Q.2d 1130, 1131-32 (N.D. Ind. 1987).

The word 'unavoidable' ... is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business. It permits them in the exercise of this care to rely upon the ordinary and trustworthy agencies of mail and telegraph, worthy and reliable employees, and such other means and instrumentalities as are usually employed in such important business. If unexpectedly, or through the unforeseen fault or imperfection of these agencies and instrumentalities, there occurs a failure, it may properly be said to be unavoidable, all other conditions of promptness in its rectification being present.

In re Mattullath, 38 App. D.C. 497, 514-15 (1912) (quoting Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (1887)); see also Winkler v. Ladd, 221 F. Supp. 550, 552, 138 U.S.P.Q. 666, 167-68 (D.D.C. 1963), aff'd, 143 U.S.P.Q. 172 (D.C. Cir. 1963); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (1913). In addition, decisions on revival are made on a "case-by-case basis, taking all the facts and circumstances into account." Smith, 671 F.2d at 538, 213 U.S.P.Q. at 982. Nonetheless, a petition cannot be granted where a petitioner has failed to meet his or her burden of establishing that the delay was "unavoidable." Haines, 673 F. Supp. at 316-17, 5 U.S.P.Q.2d at 1131-32.

Delay resulting from the lack of knowledge or improper application of the patent statute, rules of practice or the MPEP, however, does not constitute unavoidable delay. See Haines, 673

F. Supp. At 317, 5 U.S.P.Q.2d at 1132; Vincent v. Mossinghoff, 230 U.S.P.Q. 621, 624 (D.D.C. 1985); Smith v. Diamond, 209 U.S.P.Q. 1091 (D.D.C. 1981); Potter v. Dann, 201 U.S.P.Q. 574 (D.D.C. 1978); Ex parte Murray, 1891 Dec. Comm'r Pat. 130, 131 (1891). (Cf. In re Decision dated February 18, 1969, 162 U.S.P.Q. 383 (Comm'r Pat. 1969; interpretation of rule 7 was not unreasonable; hence, resultant delay in prosecution may be considered unavoidable). Furthermore, a delay caused by an applicant's lack of knowledge or improper application of the patent statute, rules of practice or the MPEP is not rendered "unavoidable" due to: (A) the applicant's reliance upon oral advice from USPTO employees; or (B) the USPTO's failure to advise the applicant of any deficiency in sufficient time to permit the applicant to take corrective action. See In re Sivertz, 227 U.S.P.Q. 255, 256 (Comm'r Pat. 1985).

Petitioner has asserted divorce and incapacitation as causes of the delay in replying to the Office action and in filing a petition to revive. On instant renewed petition, petitioner has submitted a statement in support of petition, in which, he further details the circumstances of the divorce and incapacitation. In further support of the petition, petitioner has provided copies of the Complaint for Divorce, the Final Judgment of Divorce, and a letter to the court from treating physician Dr. Roger Wolfsohn.

Petitioner's evidence has been considered, but not found adequate to establish "unavoidable" delay within the meaning of § 1.137(a). The relevant Office action was mailed on December 19, 2002. Petitioner timely filed a reply on February 24, 2003. The application became abandoned because of the insufficiency of that reply. The reply, a Notice of Appeal with the necessary payment of the Notice of Appeal fee, was rendered insufficient due to the return of petitioner's check by the Bank with a notation "NSF/DO NOT REDEPOSIT." A Notice of Abandonment was mailed on August 5, 2003. The initial petition to revive was filed more than a year later on September 23, 2004.

Petitioner states that his former wife maliciously destroyed or concealed documents pertaining to the subject application. However, he acknowledges that he did receive the subject final Office action. Further, as he responded within the shortened statutory period for reply, the record does not support a conclusion that his wife's actions prevented him from taking action, at least initially, to avoid abandonment of the application.

Further, the evidence does not show to the satisfaction of the Director that due to either petitioner's incapacitation and/or his ex-wife's actions that the insufficiency of the reply, the delay in submitting a proper reply within an extended period for reply, or the delay in filing a petition should be considered "unavoidable" within the meaning of § 1.137(a). The medical record indicates a 20 year history of depression. The medical evidence further supports a conclusion that, for some time during the relevant period, petitioner's condition was exacerbated by what petitioner describes as the illegal deprivation of access to his children. It is further recognized that the divorce sought in May 2003 was predicated on an allegation of Extreme Cruelty.

Yet, as to whether the delay at issue was unavoidable, it is noted that petitioner only required hospitalization for about 12 days, from March 31, 2003 to April 11, 2003. Further, Dr. Wolfsohn states that petitioner responded well to treatment. Dr. Wolfson does not state that petitioner was under an incapacitation of such a nature and degree as to render him unable to take action to further prosecution of this application. Dr. Wolfsohn's statement does not, as requested on initial dismissal, establish how petitioner's incapacitation allowed him to file a Notice of Appeal on February 24, 2003, yet otherwise incapacitated him from ensuring that he had timely filed a proper reply.

Moreover, petitioner states that soon after he filed the Notice of Appeal his wife closed or emptied the account upon which the check to the USPTO was drawn. However, petitioner does not submit any bank documentation to support this contention. (Any such documentation should be submitted with confidential information, such as bank account numbers or social security numbers, redacted). More importantly, petitioner does not explain when he became aware that the account was closed or emptied, or upon learning of the change in account status what actions he took to ensure that the payment to the Office was covered.

Furthermore, more than a year passed with no action on the part of applicant. Even had the Notice of Appeal been provided with sufficient payment, applicant was required to take further action to continue prosecution of the application. Within two months, petitioner should have filed an Appeal Brief (and appeal brief fee). Alternatively, petitioner should have within seven months filed a petition (and fee for extension of time) and an Appeal Brief (and appeal brief fee).

Finally, it is noted that petitioner acknowledges his unawareness of the patent process. He further appears to admit that he did not understand his options for continuing prosecution of this application. This lack of knowledge per se does not constitute unavoidable delay.

In view thereof, it is concluded that petitioner has failed to meet his burden of establishing that the delay was "unavoidable."

CONCLUSION

Accordingly, the petition must be **DISMISSED**.

Any request for reconsideration of this decision must be submitted within **TWO (2) MONTHS** from the mail date of this decision. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 C.F.R. §1.137(a)" or "Renewed Petition under 37 C.F.R. §1.137(b)," as appropriate. Extensions of time are permitted under §1.136(a).

Alternative Venue

While the showing of record is not sufficient to establish to the satisfaction of the Director that the delay was unavoidable,

petitioner is not precluded from seeking relief by filing a request for reconsideration pursuant to 37 C.F.R. §1.137(b) on the basis of unintentional delay. A grantable petition under § 1.137(b) must be accompanied by: (1) the reply required to the outstanding Office action or notice, unless previously filed; (2) the petition fee set forth in 37 C.F.R. § 1.17(m); (3) a statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unintentional; and (4) any terminal disclaimer (and fee as set forth in §1.20(d)) required pursuant to §1.137(d).

Receipt of the change of correspondence address is acknowledged and made of record.

Further correspondence with respect to this decision should be addressed as follows:

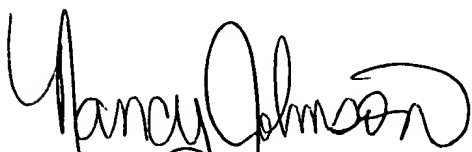
By mail: Mail Stop Petition
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By FAX: (703) 872-9306
 ATTN: NANCY JOHNSON
 SENIOR PETITIONS ATTORNEY

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Telephone inquiries related to this decision may be directed to the undersigned at (571) 272-3219.



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Enclosure: Copy of Advisory Action